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No. 06-893

In the Supreme Court of the United States

HAO ZHU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding the Board of Immigration Appeals' decision that an unmarried, 16-year-old boy did not suffer "persecution" when his girlfriend was forced to undergo an abortion.

2. Whether the court of appeals erred in holding that the administrative record did not compel the conclusion that a single incident of assault constituted persecution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Acosta, In re, 19 I. & N. Dec. 211 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 142 (B.I.A. 1990) 2
Chen v. *Ashcroft*, 381 F.3d 221 (3d Cir. 2004) 7
C-Y-Z-, In re, 21 I. & N. Dec. 915 (B.I.A. 1997) 8
Fatin v. *INS*, 12 F.3d 1233 (3d Cir. 1993) 2
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 8
Ma v. *Ashcroft*, 361 F.3d 553 (9th Cir. 2004) 7
Mogharrabi, In re, 19 I. & N. Dec. 439 (B.I.A. 1987) 2
S-L-L-, In re, 24 I. & N. Dec. 1 (B.I.A. 2006) 7, 8
Villalta, In re, 20 I. & N. Dec. 142 (B.I.A. 1990) 2
Zhang v. *Gonzales*, 434 F.3d 993 (7th Cir. 2006) 7

Treaty and statutes:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85 4

Statutes—Continued: Page

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302:
§ 101(a)(1), 119 Stat. 302 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)) 2
§ 101(a)(2), 119 Stat. 303 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)) 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(42)(B) 2, 5, 6
8 U.S.C. 1158(b)(1)(A) (Supp. V 2005) 2
8 U.S.C. 1231(b)(3)(A) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 465 F.3d 316. The order of the Board of Immigration Appeals (Pet. App. 41a-42a) and the decision of the immigration judge (Pet. App. 24a-40a) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 29, 2006. The petition for a writ of certiorari was filed on December 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be granted asylum, in the Attorney General's discretion, if "the At-

torney General determines that such alien is a refugee." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(1) and (2), 119 Stat. 302-303 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)). As relevant here, the INA defines "refugee" to include

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program.

8 U.S.C. 1101(a)(42)(B). Such persons "shall be deemed to have been persecuted on account of political opinion." *Ibid.*

In addition to the discretionary relief of asylum, mandatory withholding of removal from a particular country is available if "the Attorney General decides" than an alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

For purposes of those forms of protection from removal, "persecution" refers to significant mistreatment, and it must be inflicted either by the government of the applicant's country of origin, or by groups or individuals the government is "unable or unwilling to control." *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990). Persecution is an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (Alito, J.).

2. Petitioner is a native and citizen of China who, as a 17-year-old, attempted to enter the United States. He

was immediately placed in removal proceedings and charged with attempting to enter without valid documents. When petitioner turned 18, he was permitted to file an (otherwise untimely) application for asylum, in which he alleged persecution based on his opposition to China's population-control policy. Pet. App. 2a, 24a-26a, 29a, 34a-35a.

In his hearing before an immigration judge, petitioner testified that, at the age of 16, he impregnated his girlfriend, a fellow middle school student. When the pregnancy was discovered in April 2000, the girlfriend refused to appear at a hospital as directed by the family planning commission and, instead, hid in another city. When family planning officials visited petitioner's home, they ordered him to go with them in an effort to coerce his girlfriend to appear at the hospital. When petitioner resisted, a melee ensued, in which petitioner was struck by the officials and was hit on the head by a brick. The wound required seven stitches. The officials did not detain petitioner, but asked him to turn himself in after he received medical attention. Rather than report to the officials, petitioner went to find his girlfriend, who, unbeknownst to him, had already returned home, been discovered, and been forced to abort the pregnancy. Pet. App. 2a, 29a-31a.

In September 2000, petitioner met with his girlfriend and informed her that he was leaving for the United States. Pet. App. 2a, 31a-32a. She "was not pleased with the respondent at this point." *Id.* at 32a. Petitioner then paid smugglers $30,000 to bring him to the United States. *Ibid.* When detained at the border, petitioner was asked if he feared harm if returned to China, to which he responded that "he would possibly sit in jail." *Id.* at 33a.

The immigration judge denied petitioner's applications for asylum and withholding of removal under both the INA and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See Pet. App. 24a-40a. The immigration judge concluded that petitioner "has failed to meet his burden of establishing that he has experienced past persecution." *Id.* at 36a. The immigration judge generally credited petitioner's testimony about his relationship with his girlfriend, but specifically found that his claim that family planning officials destroyed his family home as punishment (see Pet. 2) was not truthful and, in fact, was nothing more than "an attempt to embellish his claim of stated persecution." Pet. App. 36a.

The immigration judge then held that the single melee between petitioner and family planning officials, in which he was hit and his head was cut, did not amount to "persecution" within the meaning of the INA. Pet. App. 38a. The immigration judge further concluded that, because petitioner "had no marital relationship with his girlfriend," the abortion forced upon her did not amount to persecution of him, and thus that petitioner had not "experienced past persecution based on coercive family practices." *Ibid.* In addition, the immigration judge found no well-founded fear of future persecution because the abortion was a completed event and petitioner had provided no evidence of a risk of future persecution arising out of that event. *Id.* at 38a-39a.

The Board of Immigration Appeals (BIA) affirmed in a brief per curiam order. Pet. App. 41a-42a.

3. a. The court of appeals denied the petition for review. Pet. App. 1a-23a. Stressing the "fact-specific"

nature of the persecution determination, *id.* at 6a, the court concluded that, "consider[ing] all of the circumstances of the incident in specific detail," *id.* at 4a, the "isolated beating" suffered by petitioner, while "deplorable," "does not compel a finding of past persecution," *id.* at 8a. The court noted that, in most cases, a finding of persecution rests on "one or more additional factors" beyond a single physical injury, *id.* at 4a, such as repeated assaults, prolonged detention, or another form of inhumane treatment, so that the "overall experiences endured" are "both more prolonged and more severe than that which [petitioner] encountered," *id.* at 5a. Finally, the court explained that, "[e]ssential to [its] ruling" was "the deferential nature of substantial evidence review," which precludes overturning the BIA's decision unless the record "compels" the contrary result. *Id.* at 8a.

The court also held that the abortion forced upon petitioner's girlfriend did not amount to persecution of him. The court noted that, under BIA and Seventh Circuit precedent, the definition of "refugee" that encompasses forced abortions and other coercive population control measures, 8 U.S.C. 1101(a)(42)(B), includes the husband of a woman who has a forced abortion, even if the government refuses to recognize the marriage as an aspect of its population control program. Pet. App. 9a. In this case, however, "[t]here was not even a suggestion that [petitioner and his girlfriend] had planned to wed." *Ibid.* Accordingly, the court held that "[w]e, like other circuits, have declined to expand the definition of 'refugee' to include the boyfriends of women who are forced to abort a pregnancy." *Ibid.*

Finally, the court affirmed the immigration judge's determination that petitioner had no well-founded fear

of future persecution. Pet. App. 9a-10a. The court, in fact, found petitioner's alleged fear of arrest to be "strange given the officials' decision not to detain him on April 8, [2000]," and the further fact that petitioner "remained in China until September and was never detained." *Id.* at 10a.

b. Judge Rovner dissented. Pet. App. 12a-23a. She agreed that the BIA "need not extend asylum to every man who has impregnated a woman who was later forced to terminate a pregnancy," but would have focused the persecution inquiry on "the nature of the relationship between the asylum applicant and the woman," rather than on their marital status. *Id.* at 19a. She suggested that the record in this case was "probably sufficient to establish the type of commitment" her suggested approach would require, but concluded that, "in any event it is a factual inquiry that ought to be made on a case-by-case basis." *Id.* at 20a.

ARGUMENT

1. Petitioner contends (Pet. 6-10) that this Court should decide whether the boyfriend of a woman forced to undergo an abortion falls within the INA's definition of refugee, which includes

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program.

8 U.S.C. 1101(a)(42)(B).

This Court's review of that question is not warranted for two reasons. First, there is no conflict in the circuits. As the Seventh Circuit noted (Pet. App. 9a), its decision in this case is consistent with those of "other

circuits, [which] have declined to expand the definition of 'refugee' to include the boyfriends of women who [were] forced to abort a pregnancy." No court has extended the definition to include mere boyfriends. See *Chen* v. *Ashcroft*, 381 F.3d 221, 226-227, 229 (3d Cir. 2004) (deferring to the BIA's decision not to extend the refugee definition to "unmarried partners").

Petitioner is correct that the courts of appeals have included within the definition of "refugee" spouses in both officially recognized marriages and in traditional marriages that have not been sanctioned by the government because of its coercive family control policy. See Pet. 6 n.1; Pet. App. 9a.[1] But that context-sensitive definition of the marital relationship is of no help to petitioner here because (i) the involved individuals were middle-school-aged teenagers, *id.* at App. 29a-30a, and "[t]here was not even a suggestion that they had planned to wed," *id.* at 9a; and (ii) petitioner, in fact, abandoned his girlfriend, over her objection, to come to the United States, *id.* at 32a. Indeed, even the dissenting judge expressed some hesitation as to whether the record in this case would justify the conclusion that petitioner was sufficiently committed to his girlfriend as to merit protection. *Id.* at 20a.

Second, the BIA recently addressed the application of the refugee definition to the male partners of women forced to undergo abortions. See *In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A. 2006). In that case, the BIA lim-

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[1] See *Zhang* v. *Gonzales*, 434 F.3d 993, 995 (7th Cir. 2006) (extending protection to spouse who was married in a traditional ceremony, even though the marriage was not officially registered); *Ma* v. *Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (including within the definition of "refugee" men whose marriages would be legally recognized but for China's restrictions on age of marriage).

ited the category of spouses who will qualify for relief, see *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997), to those spouses who both were opposed to the abortion and were legally married at the time of the abortion. *S-L-L-*, 24 I. & N. Dec. at 4. The BIA also suggested that "there may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to 'other resistance to a coercive population control program.'" *Id.* at 10.[2]

The BIA's decision thus leaves no room for arguing that mere boyfriends—especially underage ones who have since abandoned their girlfriends—qualify as refugees. The Board's interpretation of the INA's definition of "refugee," moreover, is entitled to substantial deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Finally, given the recency of that decision and the lack of circuit precedent addressing it, review of the BIA's interpretation and application of the statutory definition at this time would be premature.

2. Petitioner also seeks review (Pet. 10-12) of the question whether the incident in which he was hit and sustained a head injury, either separately or combined with his relationship to his girlfriend's pregnancy, constitutes persecution. However, that record-bound and "fact-specific" (Pet. App. 6a) application of settled law to the "specific detail[s]" of this case (*id.* at 4a) does not merit this Court's review.

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[2] The Second Circuit granted initial hearing en banc of the petition for review filed in *S-L-L-*. See *Shi Liang Lin* v. *Department of Justice*, No. 02-4811 (hearing en banc granted Nov. 14, 2006) (argued Mar. 7, 2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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